CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

East'n District. *January*, 1821.

EASTERN DISTRICT, JANUARY TERM, 1821.

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It appears from the evidence in the case, that the

note was made payable to a commercial house, the business of which has been conducted under the firm of M'Micken and Ficklin—that it was endorsed by M'Micken to the plaintiffs and appellees, for a valuable consideration, after the dissolution of his partnership with Ficklin.

if the note were regularly endorsed.

According to the law of partnership, it seems to be a settled doctrine, that, after the dissolution of a firm, none of the former partners can transfer, by his endorsement, the negotiable paper which belongs to the partnership, unless under an express authority, given him by the persons jointly concerned with him.

In the present case, it is contended, that such authority was vested in the defendant and appellant, by one of the articles of agreement for the dissolution of the partnership. Authority is there given him to collect all debts due to the firm and to pay such as might be due from it. For this purpose he is put in possession of all the books, notes, &c. of the firm, with power to exchange notes and accounts in the adjustment and settlement of the concerns of the partnership.

Here, it is true, is a power given to transfer or exchange notes, but it is limited to a spe-

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cific purpose, viz. the final settlement of the partnership affairs; and an endorsement or transfer, made for any other purpose, not being in pursuance of the power vested, is void. It is shewn by a contract between the parties to the present suit (found in the evidence in the cause) that, so far from the note in question having been endorsed or exchanged, in settling the affairs of the late firm, it was given in payment of property purchased by the defendant, for his sole and individual benefit. The transfer was made without authority in the endorser, and ought not to be subjected to the ordinary rules, relating to the demand of payment from the makers of notes and notice to endorsers.

By such an endorsement, the plaintiffs did not acquire a right to pursue the maker for the recovery of the amount of the note in their own names; but, as the endorser received from them its full value, we are of opinion, that he is bound to pay to them the sum therein specified, as on an original contract.

This view of the case, prevents the necessity of an inquiry into the sufficiency of the notice alleged and attempted to be proven by the appellee.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be affirmed with costs.*

Turner for the plaintiffs, *Livermore* for the defendant.

LIVINGSTON vs. *HEERMAN.*

APPLICATION for a *mandamus.*

A party dissatisfied with the opinion of a court, stating his objection at the time, may draw his bill of exceptions afterwards.

A party has a right to demand and have the opinion of the court spread on the record, on any point of law arising in the cause.

PORTER, J. delivered the opinion of the court. By an order of this court, made last July term, a rule was granted that the judge of the district court for the first district, shew cause why a *mandamus* should not issue, directing him to sign certain bills of exceptions annexed to an affidavit made by the counsel of Heerman.

To this rule the judge has made a return, and assigned for cause; that he had refused to sign the bill of exceptions first mentioned in the affidavit of counsel, because it was offered to the decision of the judge on the submitting certain facts to the jury, and had not

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* PORTER, J. did not join in this opinion, the case having been argued before he took his seat.

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been tendered until after the jury was sworn.

And that he had refused to permit the reasons offered for a new trial to be filed, because he did not think the grounds set forth admitted of further argument; most of them having been previously argued, and that this refusal was in conformity with the rules of his court.

In the discussion at the bar, which this return has given rise to, a great deal has been said on points not necessary to be decided on. It may be true, that this court has the right on appeal, to disregard impertinent facts which may have been submitted to a jury. It may be also true, that where special facts are to be found, the law has provided no means of taking down the testimony. But the opinion, which the court has formed on this motion, results from views of these subjects quite distinct from these questions, and they are alluded to now, to prevent misconstruction, and to enable us to say that no opinion has been formed respecting them.

It is provided by an act of our legislature, 1 *Martin's Digest*, 594, that " whenever on the trial of any suit in any of the inferior courts of

this state, the party or his counsel shall desire the opinion of the court, on any question of law arising in the course of such trial, it shall *be the duty of the court to give such opinion*, and either party, if dissatisfied with such opinion, *may except thereto*, and the said opinion and exception *shall be entered on record*, with so much of the testimony taken in the said suit as may be necessary to a full understanding of such opinion, and the same on appeal, shall be sent up with the other proceedings in the cause."

The legislature by this provision seems to have anxiously guarded the right of each of the parties to have the opinion of the court *on any question of law*, which during the progress of the cause they may choose to ask it on, and to have secured by an imperative direction, the right to have that opinion, with the exception thereto placed on record. There is, consequently, nothing left us for to enquire, except to ascertain, whether the opinion asked of the court in this case *was on a question of law*. If it was, the act of the legislature must be obeyed.

According to the affidavit of the counsel—he demanded the decision of the court, whether certain *facts*, about to be submitted by

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the plaintiff were pertinent, and he objected they were not. The decision of the court asked for and required by this objection, was most clearly a matter of law; and being so, it was the undoubted right of the party dissatisfied therewith, to have his bill of exceptions signed and spread on the record.

This so clearly results from the statute, that the plaintiff, who opposes this *mandamus*, endeavours to take it out of the rule which governs ordinary cases, by shewing that the defendant did not in truth *except* to these facts, being submitted to the jury—that he only said, *he would except;* that he did not draw out and tender his bill of exceptions, when the court decided on the pertinency of the issues submitted, and that it was too late to do so after the jury was sworn.

On this point the only evidence before the court, is contained in the affidavit of defendant's counsel, which states, that previous to the jury being sworn, he declared he would except to the facts submitted on the part of the plaintiff, and that he would tender a bill of exceptions thereto in form.

The court understand the law to be, that it is sufficient, if the party who is dissatisfied

with the opinion of the court, states his exception at the time the opinion is given; and that he may draw up said exception, put it in form, and present it for the signature of the judge at any time during the trial, and this is conformable to the practice in other countries, where this mode of obtaining relief against the errors of inferior tribunals is adopted and in use.

The question here then is reduced to the simple enquiry, if the party saying he would except, and tender his bill of exceptions, is equivalent to actually excepting. We understand it to mean the same thing, and think the judge ought to have signed the bill that was tendered him.

On the other point, namely, the right to spread on the record the reasons which either party may think proper to allege, as the ground of a new trial, there is as little difficulty as that first directed. This court has already declared in the case of *Sorrell* vs. *S. Julien*, 4 *Martin*, 508, that the refusing to grant a new trial was a proper subject of revision here, and one over which this court ought to exercise a controul. Taking this for granted we cannot, of course, sanction a

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proceeding which would enable the inferior court to withhold from us the means of carrying into effect the appellate jurisdiction of this tribunal. Let the *mandamus* therefore issue.

Carleton for the plaintiff, *Hennen* for the defendant.

DITMAN vs. *HOTZ.*

An award, in the French language, cannot be homologated.

APPEAL from the court of the first district.

PORTER, J. delivered the opinion of the court. This is a suit to have a decision of arbitrators homologated. In the petition it is alleged that the parties having had differences respecting the settlement of their accounts, had agreed on a compromise, and had submitted all matters contested between them to the dicision of certain persons therein named. That these arbitrators, and an umpire by them chosen, had made their award, by which they had sentenced the defendant, Hotz, to pay to the plaintiff and appellant the sum of $560; and that the said defendant, though duly notified of said award, had refused therewith to comply. The petition con-

cludes by a prayer, that the court may approve said award, and order it to be put in execution with interest and costs.

To this petition the defendant answered, that the award of said arbitrators ought not to be homologated.

1. Because it ought to contain the reasons and motives of the arbitrators.

2. Because it ought to be clear and precise, and that on the contrary, it is vague, obscure, uncertain and unintelligible.

3. Because it ought to be written in the English language.

4. Because for the same reason it does not appear properly that the arbitrators were sworn as they ought to have been.

The judge before whom the cause was tried, refused to homologate the award, on the ground that it was not drawn up in the language in which the constitution of the United States is written, and by reason that it was not otherwise sufficiently certain.

From this judgment the plaintiff appealed.

The opinion which the court formed on the third objection set forth in the defendant's an-

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swer, renders it unnecessary to examine the other points made in the cause.

The constitution of this state has provided, *art.* 6, *sec.* 15, "That all laws that may be passed by the legislature, and the public records of the state, and the judicial and legislative written proceedings of the same, shall be promulgated, preserved, and conducted in the language in which the constitution of the United States is written."

To ascertain whether the sentence of arbitrators, to which the aid of this court is demanded in order that execution may issue on it, is such an act as comes within the provision just cited; it is necessary to examine what is the nature of the act itself, and next what is the power of the court in relation to it. If it is merely the evidence on which judgment is to be rendered, then it may be written in any language the parties choose to adopt. If on the contrary, it should be found to be a judgment in itself, and over which this court has no controul, except to place it on the record, and order its execution; it will then follow, that it must be drawn up in that language in which our constitution requires judicial proceedings to be preserved and conducted.

Proceeding in the enquiry, we find that nearly every feature presented by a suit at law belongs equally to proceedings carried on before arbitrators, there is common to both modes of litigation, *actor, reus & judex*, the *contestatio litis*, and judgment on the issue joined. Our laws have provided that the persons selected as arbitrators must take an oath to decide correctly all matters submitted to them with integrity and impartiality. That the parties *must declare their pretentions, and prove them* in the same manner as in a court of justice, that arbitrators should determine as judges agreeable to the strictness of the law, *Civil Code*, 442, *art.* 12, 13, 14, and that the party not satisfied with the sentence may take an appeal, *Civil Code*, 444, *art.* 33. The court, whose aid is required to give the award effect, by ordering its execution, is prohibited any re-examination of its merits, and confined to the mere ministerial duty of enforcing the sentence, *Civil Code*, 444, *art.* 32. It is classed among judicial mortgages by a provision of our laws, which declares that *the sentence of arbitrators* gives a mortgage from the day execution is ordered by the judge, *Civil Code*, 454, *art.* 12, and finally, if not reversed on appeal,

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it obtains the authority of *res judicata*, and has, between the parties, the same effect, *Curia Phillipica* 2, *c.* 14. *no.* 28: *Part.* 3, 4, 35.

With the exception then, that the aid of another tribunal is required to give effect to the decision of arbitrators, it is not easy to perceive the difference between their award and the judgment of a court. But whatever may be the proper character of proceedings of this kind, carried on before judges of the parties own choosing, and whether they are "judicial proceedings," or not in the language of the constitution, a question not necessary at this moment to decide, this court is clearly of opinion that whenever one of the parties who may have submitted their cause to arbitrators, applies to courts of justice to have the decision of their arbitrators executed, that with this application at least commences a "judicial proceeding," and that to make the award valid which the party thus presents for homologation, it must be written in that language which the constitution requires, otherwise it would not judicially appear on the records of the court, by virtue of what sentence or judgment execution was ordered.

If indeed, as has been contended, the tribu-

nal to whom application is thus made, could new model the decision of the arbitrators, give judgment in another form, and in other words, then the objection here taken perhaps could not be sustained. But after the most attentive consideration, we have been able to bestow on the subject, we do not see how such a power can be exercised; all that the court can do, is to order that the award be executed, to direct that execution issue on the judgment presented: in making this order, it of course becomes necessary that the judgment which authorises it should be placed on record, and to be so placed, it must be in that language in which is written the constitution of the United States.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be affirmed with costs.

Seghers for the plaintiff, *Denys* for the defendant.

JULIEN vs. *LANGLISH.*

APPEAL from the court of the first district.

If freedom be given to a slave, under the express condition that he shall serve his present

MARTIN, J. delivered the opinion of the court. The petition states, that Peter Lang-

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lish, now deceased, being in his life-time the owner of the plaintiff, a black man, emancipated him on the 24th of October, 1814, by a notarial act, after having fulfilled all the formalities which the law requires: the act has a suspensive clause, by which a condition is annexed to the emancipation of the plaintiff, who was thereby bound to continue to serve the said Peter, as before, till his, the said Peter's death, when the plaintiff was fully and without further restriction to enjoy his freedom.

master, as before, till he die, and he afterwards refuse to serve him, and attempts to compel him to accept a monthly compensation in lieu of his services,—he cannot claim his freedom after the master's death.

The plaintiff alleges, that in order to comply with this condition, he, ever since, gratefully and exactly as before, served the said Peter, and regularly paid him twenty dollars per month, in conformity with an agreement on that subject made between them, and rendered him other services, when requested, till the 23d of April, 1818. In the course of which year, the said Peter instituted a suit against him, and one B. Schons, in the parish court, to have the aforesaid deed of emancipation annulled; in which suit, the said Peter finally failed, 5 *Martin*, 405. The judgment of the supreme court thereon pronounced, on the 23d of March, 1818, had scarcely become final, when,

on the 8th day of the following month, the said Peter executed what is called a deed of revocation of his deed of emancipation, before a notary, and on the 23d, the plaintiff was, through the agency of several ill-disposed persons, who availing themselves of the old age and infirmities of the said Peter, had prevailed on him to execute the deed of revocation, arrested, and deprived of every article of property, even of his clothes, dragged to jail, and inhumanely whipt: whereupon, in order to prevent the recurrence of such abuse, he resorted to the authority of the law, and instituted a suit against the said Peter, which he was afterwards advised to, and did discontinue.

The petition further charges, that the said Peter, on the 9th of December following, instituted the present defendant his heir, and she now, the said Peter having since died, wrongfully claims and detains the plaintiff as a part of the testator's estate.

The answer states, that the plaintiff is, and has ever been a slave; and is the property of the defendant;—that the pretended deed of emancipation is null and void; that admiting its legality, it cannot avail the defendant,

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being a *donatio mortis causâ*, and having been revoked. The general issue is pleaded.

The district court gave judgment for the plaintiff, being of opinion that "the act of emancipation was executed in due form of law, and the plaintiff acquired by it an absolute and indefeasible right to his freedom, as the person therein mentioned; and between the execution of the act and the death of said Peter, the latter had the same rule and authority over the plaintiff as he had before; but the right of freedom, having once been acquired, could not afterwards be altered or forfeited by any act of the plaintiff or his master—because it is inalienable." The defendant appealed.

The documents which come up with the record, are the acts of emancipation and revocation; the proceedings in the suit brought by Peter Langlish, to have the first act annulled, and in the suit brought against him by the present plaintiff, referred to in the petition.

The deed of emancipation purports, that Peter Langlish, "by these presents, gives freedom to his negro slave, named Julien, 46 years of age, gratuitously, and to remunerate

him for his fidelity and former services, and those he is to render him until his death; which freedom is given, under the express condition, that he shall serve his present master as before till he die; after whose death he is to enjoy it fully, without any opposition or contradiction from any person whatever. Wherefore, *au moyen de quoi*, he divests himself and parts with all his right of property and actions on the said slave Julien, in order that he may deal, contract, sell, purchase, make a will, and enjoy all the privileges of a freeman, after the grantor's death."

Boisgobert deposed, that Peter Langlish told him, the plaintiff should never serve any other master after his death—that the plaintiff always conducted himself well, and never ran away. It is in the deponent's knowlege, that the plaintiff continued to serve his master faithfully until he was put in prison. About ten years ago, P. Langlish told this deponent, that the plaintiff worked in town, and paid him eighteen dollars per month. The deponent then lived on the bayou, and now lives on the bayou road. P. Langlish lived at the Metairie, about a league and a half from town. The deponent has since been frequently in

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the neighbourhood, and seen the plantiff coming out of his master's plantation with vegetables.

A number of other witnesses testified to the same fact.

The gaoler deposed, that the plaintiff was brought to the gaol, on the 23d of April, 1818, and whipt. This was done, and he was detained on the verbal order of the defendant, by one Valcour, who conducted the plaintiff to gaol. The latter remained there, till released by an order of court, on the 23d of May following.

Dutillet saw the plaintiff when he was going to gaol, and asked him what was the matter: he replied, that his master, who was an old rogue, sent him to gaol and wanted to deprive him of his liberty.

Another witness deposed to the same fact.

Beaulieu deposed, that he knew P. Langlish for twenty-two years—that he enjoyed his mental faculties till his death.

The deed of revocation bears date of the 18th of April, 1818. P. Langlish therein declares, in general terms, that he has "just and valid motives to change his dispositions," and revokes and annuls the act of emancipation.

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We are of opinion, that the plaintiff has not proved that he fulfilled the condition on which he was to be free at his master's death, and it is in proof that he did not. He refused to serve him as a slave, and was desirous of compelling him to accept, in lieu of his services, a monthly compensation of eighteen dollars. He brought a suit for this purpose, which he afterwards discontinued. The testimony of Dutillet, and the witness who followed him, shew that he insisted on enjoying his freedom before the death of his master, since he charged him with being an old rogue, who was seeking to deprive him of his freedom.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be annulled, avoided, and reversed, and that there be judgment for the defendant.*

Seghres for the plaintiff, *Mazureau* and *Morel* for the defendant.

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* PORTER, J. did not join in this opinion, the case having been argued before he took his seat.

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GALES' HEIRS vs. PENNY.

GALES' HEIRS vs. *PENNY.*

If A. promise to B. to do a certain thing and fails, C. cannot maintain an action on this promise, on the ground that the knowledge of this promise induced him to contract with B.

APPEAL from the court of the third district.

PORTER, J. delivered the opinion of the court. The plaintiffs allege that a suit had been commenced in the third district court, for the parish of East Baton Rouge, by one Lilley, against a certain Thomas C. Stannard. That the defendant was arrested and held to bail. That their father Christopher Gales, now deceased, became his security and signed a bail bond in the usual form. That Lilley prosecuted his suit to final judgment against Stannard, and that not being paid by him, he commenced an action against their ancestor on the bail bond, and received from him the sum of $1300 which has been since paid by his heirs.

They further allege, that one James Penny, the defendant and appellee, and father-in-law to the said Stannard, had craftily, and deceitfully induced their ancestor to sign the said bond, on a promise to save him harmless from all consequences resulting from his engagement; the petition concludes by averring that he, the said Penny, had not fulfilled this engagement, their damage by reason thereof, $1500, and praying judgment for the amount.

There was but one witness introduced in the cause, and his evidence in substance is, "That in the suit of *Lilley* vs. *Stannard*, process was put into his hands against Stannard, and bail required, that a day or two after the arrest, Stannard (who had been suffered to go at large on the witness's responsibility) and captain Penny, the defendant, came into his office together, and that Penny mentioned, that he and captain Gales were to be the securities of Mr. Stannard, the day following was appointed for executing the bond. The witness drew the bond and referred it for signing, inserting the names of the two sureties. Next morning being informed that Penny was about starting to New-Orleans, and apprehending some difficulty, he called on him to sign the bond before he went away; Penny answered that he was in a hurry, that Gales could sign it when he came in, *but did not direct witness to tell Gales to sign the bond, only said he would sign it on his return;* a few hours after Penny was gone, captain Gales came with Stannard, the witness presented him the bail bond, Gales asked where Penny was, he was answered that he had gone to New-Orleans, on learning which Gales refused to sign. But

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ultimately agreed to do so, on being informed by Stannard, and witness, that Penny had agreed to sign the bond; some time after Penny returned from New-Orleans, witness called upon him, and asked him to put his signature to the instrument already signed by Gales. He refused, *does not believe that Penny and Gales ever had any conversation with each other on the subject.* On his cross-examination the witness deposed, that it was three months after Penny's return before he called on him to sign the bond; that he communicated his refusal to Gales immediately; that Stannard remained in Baton Rouge five or six months after Gales was informed of Penny's refusal to become co-security. *There was judgment for defendant, and the plaintiff appealed.*

If the defendant be liable in this case it must be either,

1. Because he fraudulently induced the ancestor of the plaintiff to sign the bond on a promise to save him harmless; or,

2. Because he engaged to become co-surety, and is bound by that engagement to the same extent as if he had actually signed the instrument.

I. There is no evidence that the defen-

dant induced Gales to sign the bond by false representations, or indeed, that he made any representations to him on the subject. The witness proves that Stannard and Penny came to his office, and that the latter observed, that he and Gales were to become securities. But which of them proposed this to the other we cannot learn. It is most probable they both consented to become so at the solicitation of Stannard. The witness declares he does not believe that Penny and Gales had any conversation on the subject. There is nothing in the record therefore which authorises the plaintiffs to recover on this alligation, that their ancestor was deceived and defrauded by the defendant.

II. On the other ground, the evidence is equally defective in supporting the plaintiffs pretentions. On looking into it, we do not see any thing which proves that the defendant ever entered into a contract with the father of the plaintiffs; in regard to becoming co-security for Stannard, that he ever made him a promise, or came under any engagement to him in respect to it. *The promise proved, was to the sheriff, not to Gales*, and the former might perhaps, have maintained an

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action for the non-performance of it. But the plaintiffs cannot; the only ground on which it can be at all alleged, that the plaintiffs have sustained injury by the defendant's promise to the sheriff, is, that in consequence of it, their ancestor was induced to sign the bond, which has since been paid by his representatives. But this is too remote a consideration to form the ground of legal responsibility, and it would be carrying the doctrine on this head, to a most dangerous extent, to say, that because A. has promised B. to do a certain thing, and fail to do it, that C. can maintain an action for the breach of this promise, because a knowledge of that promise was the leading motive that induced him to contract with B.

This opinion renders it unnecessary to examine the other questions raised by the defendant, as to the right of the plaintiffs to bring the suit, and the competence of a single witness to prove the facts on which recovery was demanded.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be affirmed with costs.

Preston for plaintiffs, *Eustis* for defendant.

BRUNEAU vs. *BRUNEAU'S HEIRS.*

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BRUNEAU vs. BRUNEAU'S HEIRS.

APPEAL from the court of the parish and city of New-Orleans.

In the Spanish law, as under the civil code, the community of goods between married persons existed, without being stipulated for.

MARTIN, J. delivered the opinion of the court. The plantiff, widow of the defendants' ancestor, claims from them one half of the property acquired during her coverture, and $500, which she alleges were received by her husband (part of her paraphernal estate) or which she brought in marriage.

They resist her claim, on the ground that she produces no marriage contract in support of her pretention to a community of goods, and they deny that their ancestor received any thing as her paraphernal, or dotal property.

The parish court gave judgment for her, and the defendants appealed.

The facts appear by depositions and documents which come up with the record.

These shew, that the plaintiff was married in the year 1791, in the parish of St. James. Some of the witnesses depose, that there was a marriage contract, and one of them, that he heard it from the plaintiff herself. But no

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trace of it appears in the office of the parish judge. At the time of her marriage, she had a claim for $525, for a tract of land which she had sold, the price of which was not yet payable; and, after her marriage, she gave acquittances for $500, in part of it, and it is in evidence, that the defendants' ancestor mentioned his having received that sum.

It is in evidence, that the marriage took place in the parish of St. James, and that the records in the office of the parish judge have been closely examined, and he has sworn that no trace of the plaintiff's contract of marriage is to be found among the papers delivered by the commandant of the parish, who alone acted at that time as a notary in that parish.

I. As the marriage took place while this country was under the dominion of Spain, the laws of that kingdom afford us the only legitimate rule of decision.

Whatever husband and wife acquire or purchase during the marriage, is to be divided among them by halves. *Recop. de Cast.* 5, 9, 2.

The goods which husband and wife acquire during the marriage, whilst they live together, are to be divided between them by halves, in

these kingdoms of Castille: and even when they proceed from a donation made to them by the king or other person; or, if they have purchased them, it matters not whether the purchase was made in the name of either or both, because the time of the purchase is alone to be considered, not the party in whose name it was made; for in this respect, husband and wife are considered as one person; and unless it should appear what are the goods, and their value, which each party brings in marriage, or which had been given to him separately, or which he has inherited during the marriage, all are presumed common. 1 *Febrero Contratos*, 1, 2, *n.* 9.

This part of the Spanish law has been transcribed in one of our statutes. *Civ. Code*, 137, *art.* 64 *and* 67.

The law rendering the wife, by the marriage alone, a sharer of the property acquired by the husband, if this advantage was renounced by a marriage contract, or if any other change was made in the provisions of the law, he ought to produce the contract. It cannot be imputed to the plaintiff, that she does not produce hers, although she is proven to have said that there was one. She claims

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nothing under it: she has made every reasonable effort to procure a copy, if it existed, by a search in the office in which it ought to be.

A wife seldom takes the precaution of preserving a copy of her marriage contract. It is deposited with the notary for the benefit of every person interested therein; and when she places her person and property in the power of a man, a woman seldom keeps her papers from him.

II. Although the receipt for the $500 was signed by the plaintiff alone, it is in evidence from the lips of the defendants' ancestor, that the money came to his hands. This is not contrary to the receipt; for the wife may well, after the receipt of the money, have handed it over instantly to her husband, which is what ordinarily happens. The receipt proves only *rem ipsam*, the *payment* of the money by the debtor, which is the *receipt* by the creditor, although the money may not be directly and instantly paid into his hands.

It is therefore ordered, adjudged, and decreed, that the judgment of the parish court be affirmed with costs.

Denis for the plaintiff, *Livingston* for the defendants.

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If a slave of a bad character is pursued on suspicion of felony, attempts to seize a gun, flies, and is killed in the pursuit, the supreme court will not disturb a verdict for the defendant, who killed him.

APPEAL from the court of the third district.

MATHEWS, J. delivered the opinion of the court. This is a case in which the plaintiff seeks to recover damages to the value of a slave, alleged to have been killed by the defendant.

The case was submitted to a jury, who found for the latter, and from the judgment rendered on the verdict, the former appealed.

The evidence in the case shews property in the appellant, and the killing by the appellee. The only question is, whether the killing took place under circumstances that justify it.

The testimony which comes up with the record is multifarious, but from it we gather the following facts, that the slave was in the habit of going at large without a written permission from his master; that he was of a bad character, and was killed in the defendant's attempt to arrest him, on a suspicion of his having committed a felony, whilst he was endeavouring to effect his escape, having attempted to seize a gun.

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The verdict of the jury is general, and decides both the law and facts of the case, and it is the opinion of a majority of this court, that the verdict and judgment are correct.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be affirmed with costs.

Eustis for plaintiff, *Turner* for defendant.

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Notice of the taking of depositions out of the state is to be given as in case of depositions taken within.

But, it is not necessary that the giving notice should appear by the return of the commissioner, it may be proved by affidavit.

The day should be mentioned in the notice.

Notice must be served on the party if present, otherwise on the attorney.

APPEAL from the court of the first district.

Smith, for the defendant. Certain depositions taken at Mobile, in Alabama, under a commission issued out of the court below, at the instance of the plaintiff, being offered in evidence on the trial, were over-ruled, on the objection of the defendant's counsel, for want of due notice of the execution of the commission: from which decision (amounting to a nonsuit, there being no other evidence) the plaintiff has appealed.

To the return to the commission was annexed, the copy of *a notice*, addressed *to the defendant*, and signed by John Manager, as commis-

sioner, dated, Mobile, *May 29th*, 1820, apprising the defendant that the examination of witnesses, on the part of the plaintiff, would be proceeded in at a certain office in Mobile, between the *hours of* 10 *o'clock*, *A. M.*, *and* 5 *o'clock*, *P. M.*, and be continued, by adjournment, from day to day, until finished. *At the foot* of the notice, the defendant is invited to name *one* commissioner. *No day* is named in the notice to which the hours expressed might belong. On the back of the notice is the affidavit of a certain Neife, that he served it on *Col. Harris*, *agent and partner* of the defendant, at the Red Bluffs, on the opposite side of the bay of Mobile, *on the 1st of June.* The affidavit is made before J. Manager, as commissioner, on the 1st of June.

On the part of the plaintiff, it is contended that this was a sufficient notice; but, that if not, another notice, specifying the time and place of executing it, had been served by the *counsel* of the plaintiff, on the *counsel* of the defendant, *in New-Orleans*, prior to the issuing of the commission. In proof of this, the affidavit of the plaintiff's counsel was exhibited at the trial. *No such* notice *is certified in the return* to the commission. By this evidence of

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another notice, (even if *testimonial* proof were admissible in lieu of the certificate of the commissioner, and in implied opposition to it of the notice relied on) it does not appear that it even named the commissioner on the part of the plaintiff. A counter affidavit of the defendant's counsel states, that this notice addressed *to him* was refused for the reasons that the place of caption was at a distance, in *another state*; and that the defendant, or his agent, (one of whom probably, and *the other certainly*, because there resident) would be very near the spot, and would be the proper subject of such a notice. It appears too, that the defendant was not a resident of this state: that he was interested in a contract with the government, for building the fortifications on Mobile bay, likely to detain him there for a long period: and that "Col. Harris, his agent and partner," was actually resident with his family at *Red Bluffs*, opposite to Mobile.

In this case, it is contended for the defendant, that the depositions must be rejected. In the first place, because the return to the commission, as a written proof, ought to contain within itself, without any deficiency, the evidence of its own authenticity and regularity.

The right to cross-examine is fundamental, and indispensable to the defendant's being placed on an equal footing with the adverse party; every preliminary proof of the perfect enjoyment of that right ought to appear on the face of the paper exhibiting the evidence, for the party who had obtained the commission. This will be rigorously required, because, emanating from the commissioner himself, at the time, and making a part of the very act of embodying the depositions, it is clearly the best evidence of such facts. Further, this mode of obtaining evidence ought to be thus strictly guarded, both from its manifest liability to abuse, and from the intrinsic imperfection of the nature of the evidence itself. Now, the right to cross-examine cannot, according to good faith, be adequately extended to the adverse party, without a reasonably antecedent notice to him, or to his agent, if known to be resident at, or near the place of caption, and especially, if that be situated in another state. The right to obtain evidence, by commission, at all, being founded, not on its own excellence as a mode, but solely on the equitable regard to the rights of the party obtaining it, which might otherwise be

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infringed, it ought to be exercised with an observance of every thing which equity can require for the rights of the adverse party. The notice therefore, ought, in all cases where the scene of caption is beyond the jurisdiction of the state where the cause is entertained, to be served on the party himself, or his agent, if conveniently practicable: it ought to have convenient certainty, as to the time and place of taking the depositions, and the name of the commissioner, if not already named or agreed on, who is selected to take them. It ought, perhaps, to proceed from the nominated commissioner himself, who certainly can, with the least liability to error, give the information it should contain: at least, before the interrogation of witnesses, proof of such notice ought always to be exhibited to his satisfaction; which proof would then regularly appear along with the other parts of his proceeding in his certified return. To allow these facts to be made out, by other and inferior proof, would often be exposing a party to the strong temptation of seeking witnesses to bolster-up a favourable deposition, obtained perhaps by the omission of somewhat of that perfect fairness which equity would demand

for the adverse party. This reasoning is supported by its analogy to the act of congress, and sundry decisions of the state courts. By the act of congress of 1789, (*Grayson, Tit. Judiciary, sec.* 30, *p.* 248) requiring, that in obtaining evidence by the depositions of distant witnesses, *the notice*, if any to the adverse party, should be *certified by the commissioner in his return.* In the supreme judicial court of Massachusetts, in the case of *Bernes* vs. *Ball, & al. adms.* (1 *Mass. T. R.* 75) a deposition taken under the order of the court was excluded, because it did not appear *by the certificate of the justice* who had taken it, that the adverse party, or his attorney, was notified or present: and the offer of *testimonial* proof of notice, and of the consent of the adverse party, that the deposition might be taken, *ex parte*, in the event of his absence, was rejected. In the court of appeals of Virginia, (2 *Washington*, 75, *Collins*, vs. *Lowrig, & co.*) it was decided, that whether a deposition have been taken, *de bene esse*, or in chief, *notice* must have been given to the adverse party, and must *appear upon the record* to have been given, else it will be erroneous. See too, 1 *Harris & M'Henry*, 172, 3. *Thomas* vs. *Clagget*, where a deposition was

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rejected, because it did not appear that notice had been lodged with the clerk of the county *to be recorded;* although it was proven that notice had been given to the defendant twenty days beforehand, of the day and place: and that the defendant had attended accordingly, and cross-examined; which case, though depending probably on a particular statute, is still an illustration of the strictness that should be observed, in guarding this mode of obtaining evidence. In Pennsylvania, (2 *Sargent & Rawle*, 478, *Hamilton* vs. *M'Guire*) it is decided that notice must be sufficiently antecedent to the taking of the deposition, to afford a *reasonable time* to the adverse party to avail himself of it. In Virginia, (4 *Henry & Munf.* 1, *Coleman, ex.* vs. *Moodie*) it was decided that a notice of the taking of a deposition served *at the domicil* of the adverse party, on *his wife*, during *his absence* from the commonwealth, which *might have been served upon himself*, was not a *reasonable notice*, and the deposition was rejected.

Applying the principles of this reasoning, and these authorities, as a test, in the first place, of the notice certified in the return, it is deemed to be fatally defective; 1st, for *un-*

certainty in having assigned *no day* to which the specified *hour* could belong; and in the next place, assuming the day of the date for that purpose; then, for being unseasonable in being signified to the agent of the defendant, three days *posterior* to the appointed day of executing the commission.

Can the alledged notice of the *counsel* of the plaintiff, to the *counsel* of the defendant *in New-Orleans*, prior to the issuing of the commission of the intention of *another* person, (*not* yet *named*) to take depositions *at Mobile*, supply the defect of a sufficient notice certified in the return?

It is contended on the part of the defendant, that it cannot,

1st. Because the plaintiff has *undertaken*, through his commissioner, to give *personal* notice to the defendant himself, and which has been annexed and *certified in his return* to the commission: shall he not be *concluded* by it? Is it not an implied admission that he relied on *no other notice*, or if he had, that he had abandoned such reliance? does it not show that he was aware of the duty, (especially under these circumstances) of giving personal notice to the defendant himself: that he was

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well aware of the residence of the defendant's "agent and partner," and that, that "agent and partner," (if not the defendant himself, as is believed) was there, almost within call: and further, that he was not ignorant of the importance (to the regularity of his depositions) of making that notice appear in the certified return.

The alleged notice to the *counsel* in New-Orleans, cannot supply the defects of that which was given by the the commissioner, and certified in his return; because, in the second place, the evidence of that notice to the counsel, if otherwise good, could not, upon the principles already contended for, competently appear by the certified return.

In the next place; because in all cases where the party in the cause is *resident out of the jurisdiction of the state* where the cause is entertained, it is *not enough* to give *notice to the attorney at law.* This proposition rests firmly on the basis of the defendant's whole argument; which is, that this mode of obtaining evidence being intrinsically and peculiarly defective, and easily liable to abuse; and a benefit equitably extended to a party, only to avoid the loss of otherwise unattainable evi-

dence, he is bound in resorting to so favourable an aid, to observe towards the opposite party, every thing which equity can require for him. But equity plainly requires, that he should, so far as possible, be afforded the opportunity of effectually cross-examining. Now, when the opposite party resides elsewhere than within the state, it is, especially, not to be presumed, that the attorney *at law* can obtain so intimate a knowledge of all the circumstances relating to the testimony sought, as to be able to cross-examine, with the advantage which a seasonable notice to his client would afford. Equity then exacts, *in such case*, more than notice to the attorney *at law*. The reasonableness of this position is supported by the case of *Cahil*, executor of *Quin* vs. *Pintony*, (4 *Munf.* 371) which directly decides, that, in the absence of the principal from the commonwealth, notice to the attorney *at law* is insufficient. But in the case before the court, not only was the principal not resident in the commonwealth, where the cause is entertained, but *the place* also where the *depositions* were to be taken, *was in another state*, and entirely beyond the sphere of his practice. Since then, as is evident, his professional duties in his own

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courts, forbade the presumption, that he could *personally* comply with the obvious purpose of the notice; to what imaginable end was it signified to him? Let it be remembered, that he was not the attorney, *in fact*, of his client; that, therefore, to have appointed a substitute was beyond his powers; and, as to the agency of transmitting this notice *for the plaintiff*, (if that be in view) and for which he could have no greater facilities than the plaintiff himself, it manifestly does not fall within the circle of his duties as the conductor of a suit at law. It could as well have been addressed through the *post-office*, directly to the defendant himself, or to his agent and partner; or, enclosed with the commission, and by the commissioner transmitted to the defendant, or his agent, in his vicinity. Thus the uncertainty, at least, of this notice, arising from the source of it, would have been somewhat diminished, since the act of the commissioner, forwarding such notice, would have implied, at once, his satisfaction of it and his acceptance of his trust.

But, besides these objections to the alleged notice to the *counsel* of the defendant, it is further answered, that he *declined accepting it*; pointing out the defendant himself, or his

agent, (in the vicinity of the place of caption) as the proper subject of such a notice.

By this refusal, which certainly his professional duty did not forbid; the plaintiff, if, before he could have doubted, was now apprized of what he should do for the exact fulfilment of his duty in this respect; and this, too, in time to have fulfilled it; and not by being subjected to any onerous, or unusual, or circuitous task; but, by the natural, very equitable act of simply giving notice to the defendant himself, or to his agent; well known to the plaintiff as the real party, and with whom, alone, his alleged contract was made; whom, chiefly, he holds liable for its pretended violation; and who, also, was known to be resident almost within hail of the place of caption. Why did the plaintiff observe so careful a silence towards the defendant, especially when so conveniently situated for hearing? Was his colourable notice, annexed to the return, a fulfilment of that perfect good faith which the law exacts from him whom it so equitably aids? Whatever may have been the motive, the effect of this anti-dated, but post-delivered notice, annexed to the return, if good, would be to de-

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prive the defendant of the privilege *expressly reserved* to him, of naming *one* commissioner. The very reservation of this right, apparent on the face of the notice, clearly implies the anticipation of some reciprocal communication between the parties, at the place of caption. It was a right of which the defendant could not regularly be deprived. Commissioners must be appointed, either by the agreement of the parties, or by the order of the court. In this instance the commisioners were not named by the court, nor has the defendant consented to an *ex parte* taking of the depositions. For this cause, also, the depositions have been irregularly taken, and therefore ought to be suppressed.

Livermore, for the plantiff. It appears, in the present cause, that the plaintiff is a citizen of Massachusetts, and the defendant a citizen of Virginia; neither of them having a permanent residence in this state. The defendant having business which required his presence sometimes in New-Orleans, and sometimes in Mobile, was arrested here, and liberated upon bail. Upon the return of the

writ, an answer was filed by his attorney, and a commission taken out, addressed to J. T. Manager, authorising him to take the depositions of witnesses in Mobile. Afterwards the plaintiff's attorney gave notice to the defendant's attorney, that witnesses would be examined at a certain place in Mobile, on the 29th of May, and that the examination would be continued from day to day. The commission was opened on the 29th, but continued, by adjournment, to the 2d of June. On the 29th, the commissioner addressed a written notice to the defendant's partner, the defendant being then in New-Orleans. This notice was served on the 1st of June.

The defendant objects, that he had not due notice of the time of taking these depositions. The notice by the commissioner is said to be too uncertain. Although, we believe, that this was a notice of which the defendant's agent might have availed himself, and ought to have done so; yet as we consider it to have been a work of superogation, and that the former notice given to the defendant's attorney, was amply sufficient to satisfy the requisitions of the law, I shall not dwell upon this notice in Mobile. The uniform practice has

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been, to give notices of this description to the attorney in the cause, and not to the party. If this practice has originated in error, it is important to the bar, that the error should be corrected. If even doubts can exist upon this point of practice, it is desirable that the practice should be settled.

It is contended, that the notice should be given by the commissioner, and not by the party or his attorney; that it should be given to the party and not to his attorney; and that the service of notice should appear by the return to the commission, and cannot be proved by affidavit.

In support of these positions, the gentleman has cited the act of congress of 1789, for organizing the courts of the United States, two cases from Virginia reports, and one from Massachusetts. His other citations do not seem to bear upon the question. The practice of the courts of the United States is that of the common law courts of England. By the strictness of the common law, testimony must be taken in open court, in presence of the jury. The act of congress dispenses with the necessity of this examination, in cases where the witness resides more than one hun-

dred miles from the place of trial, but prescribes certain formalities to be observed in taking depositions; and requires, that the observance of these formalities should appear by the certificate of the judge before whom the testimony is taken. The authority is given only to the judges of certain courts, and the act requires, that the deposition shall be reduced to writing by the judge, or by the witness in his presence, and that this shall also be certified. This certificate might as well be required in this case as the certificate of notice. These are all matters of positive regulation, and furnish no rule for the government of courts which do not derive their authority from the United States. Nor does the admissibility of depositions, as evidence in our courts, depend upon the statutes or laws of Virginia or Massachusetts. In the case cited from 1 *Mass. Rep.*, the provisions of the statutes of that state, respecting depositions, do not appear; but we find, that of three judges, one was in favour of receiving the depositions, and two were against it. The cases cited from the Virginia reports, evidently depend upon the positive regulations of the statute laws of that state. The note of the case of *Cahil*,

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executor of *Quin* vs. *Pintony* is, that "notice of taking depositions is not sufficient if given to the attorney-at-law, in the absence of the principal from the commonwealth, but ought to be given to the agent or attorney in fact; or (if there be none) by publication in the manner prescribed by law." In the other case cited by the defendant's counsel, (*Coleman* vs. *Moody*) it is stated, that the notice was not considered reasonable, because advantage was taken of the temporary absence of the party, and the notice left with his wife, when the adverse party knew of his absence; when he might have given the notice previously, or without prejudice of the trial of the cause, have postponed the taking of the depositions until his return. The most that the gentlemen can make of these cases is, that the legislators of Virginia have taken a different view of the duties and authority of an attorney-at-law, from other legislators. It will be more material to examine our own laws for a solution of this question.

The examination of witnesses in open court, is not a practice known to the ancient laws of this country. In civil law-courts, all testimony is reduced to writing in the form of de-

positions, and is taken before commissioners appointed for that purpose. By the act of April 10, 1805, *ch.* 26, *sec.* 19, (2 *Martin's Dig.* 178) it is provided, that "the examination of all witnesses shall be taken in open court, or before such persons as the court may, in each case, authorise to take the same." In the same section, particular provisions are made for the examination of aged and infirm persons, and of persons about to depart from the territory, and power is given to certain magistrates to take the depositions of such persons, and to compel their attendance, "previous reasonable notice of the time and place of such examination having been given to the opposite party." The same section afterwards provides, that "if the party producing such depositions shall prove by affidavit, that notice was given to the adverse party, the same shall be good evidence." By the act of February, 1813, *ch.* 12, *sec.* 29, it is enacted, that witnesses shall not be compelled to attend any court out of the parish where they reside, and the district courts are authorised to issue commissions to take the depositions of such witnesses; and such depositions, when recorded in the presence of the adverse party, or after timely

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notice given to him, shall be admitted as good evidence on the trial, (2 *Martin's Dig.* 194.) The last statutory provision upon this subject, is contained in the act of January 28, 1817, *sec.* 7. This provides for all cases where evidence may be taken by depositions, that they may be taken before any justice of the peace, or other commissioner, "after due notice given to the opposite party."

Nothing now seems, therefore, to be required by the laws of this state, than that the party shall have reasonable notice of the time and place of examining the witness. It is not required, that the notice shall proceed from the commissioner, and it may as well be given by the party; nor is it required, that the service of notice should be certified by the commissioner, but on the contrary, it may be proved by affidavit. Neither the act of congress, nor the rules established in Virginia and Massachusetts can effect a mere point of practice depending upon our own positive laws. The only question, therefore is, what is notice to the party. Is not notice to the attorney in the cause, notice to the party?

It is a general principle, that notice to an agent is notice to his principal, provided the

notice came to the agent in the course of the business for which he is employed, 3 *Atk.* 646, 13 *Ves. jr.* 120, 2 *Bin.* 574, 609. In *Anderson* vs. *the Highland Turnpike Co.* 16 *Johns.* 86, *Spencer*, C. J., says, that any matter *in pays* which may be done by or to a party, may be done by or to his agent. This is a general rule of law which is peculiar to no one system of jurisprudence, but is common to all, being the dictate of reason. The principle applies with great force to the case of an attorney employed to manage a cause. He is retained for his skill and knowlege, to represent and defend his client in every thing respecting the conducting, prosecuting, or defending of the case. After issue joined, no communication is considered to take place between the opposite parties, but only between the attornies of those parties, and between the attornies and their respective clients. Such we find to be the rule expressly laid down in the *Curia Philipica, p.* 1, *sec.* 12, *n.* 11. *Despues de contestada la causa por el procurador, á él se ha de citar para todos los demas autos de ella, y no al señor del pleyto: tanto, que la citacion hecha al señor no vale, ne ser de momento*," &c. Here we find, that after issue joined, all notices in the cause are

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to be served upon the attorney, and not upon the party; yet, in contemplation of law, the service is upon the party, represented by his attorney. We find this construction of notice to a party in a cause given by one of the most enlightened state tribunals in the United States. By the 28th rule of practice of the court of chancery in New-York, it is required, that notice of the examination of witnesses shall be given to the adverse party. *Blake's Chanc. Prac. App.* 7. The form of the notice under this rule, we find in the body of the same book, *p.* 142. The notice is to the solicitor, and not to the plaintiff or defendant. The same course is pursued in the English courts. The notice is given to the attorney or solicitor.

The right of cross-examination is not denied. But by whom is this right to be exercised? when witnesses are examined in court, the cross-examination is not by the plaintiff or defendant, but by the counsel. There is no difference in principle between testimony taken in court, and out of court. The presence of the party is not necessary upon the trial, because he is represented by his attorney. When a cause is alleged for trial, the absence of the

attorney, for an unforseen and necessary cause, would be a good reason for a continuance, although the party might be present in court. The reason is this, that the attorney alone is considered, in law, to have the competent skill and knowlege for managing the cause. If the attorney be able to attend, the absence of his client, from whatever cause, would be no ground for a continuance. The same reasons will apply to the execution of commissions. Let us suppose, that, in the present case, the defendant had left New-Orleans, after the answer filed, and had remained in Mobile, that the plaintiff's attorney had taken a commission, that he had given no notice of it to the defendant's attorney, but had given notice to the defendant himself at Mobile. Would this have been considered sufficient? Would not the defendant have had a right to say, that the attorney whom he had employed here, was most competent to direct the course of examination of witnesses in a cause to be tried here? It cannot, however, be pretended, that there is a necessity of giving notice to the defendant, and to his attorney. The authority cited from the *Curia Philipica*, shows that the notice must be to the attorney.

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It is unnecessary to point out all the inconveniences which would flow from the doctrines of the district court. If this decision is to be maintained, there can be no use in arresting a transient person, unless the whole evidence of the debt be in writing, or can be had from witnesses, whose attendance in court may be compelled. The rule to be settled must be general. If, therefore, a person, having no fixed place of residence, is arrested in New-Orleans, upon a debt contracted in Virginia, or upon a contract made here in the presence only of persons who have left the state, he may be released upon bail, and his creditor will have no security. The defendant may leave the state immediately, and no commission can be executed, because no notice can be served upon him. If, in such a case, the plaintiff and attorney should take a commission, and should give notice to the defendant's attorney, of the time and place of executing it, the latter might say, as is done here, that he could not, or would not attend to it, and that notice must be given to his client. The answer of the court must be, that he has undertaken the management of the cause, that it is his duty to attend to it, that

his authority to act for his client, is presumed to be sufficient, and that the attorney for the opposite party is not bound to look further.

This is the answer which, I presume, the court would give upon the statement made in the counter affidavit of the defendant's attorney. But I conceive that this is not a case in which counter affidavits can be received. When the law allows any matter to be proved by affidavit, there can be no counter affidavit. Upon an affidavit for a continuance, the matters sworn to must be taken to be true, so in all other matters to be proved by affidavit. The affidavit of the defendant's counsel, ought not, therefore, to have been received, and should be disregarded.

The notice was not given before the commission issued, as is stated in the defendant's argument; but was given afterwards, and so appears by the record. The commission was directed to the person who executed it, and nothing judicially appears of the reservation of any right to join another commissioner. However, no point was made upon this in the court below. The only question there decided was, that notice to the attorney was not sufficient. This is conceived to be the only

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question for this court. If the cause be remanded, any other objections to the reading of the depositions will be open to the defendant; and if any new objections are made, the plaintiff should be allowed the opportunity of rebutting them by evidence.

As to the notice given by the commissioner, it was merely an act of his own, and intended for the benefit and satisfaction of the defendant. It was not advised by the plaintiff's attorney, nor can it affect the notice previously given here. On the part of the defendant, the whole course of conduct appears to have been a trick. The witnesses were transient persons, not resident in Mobile, and a hope was entertained that the payment of the debt, justly due by the defendant, might be avoided, if these depositions could be suppressed.

PORTER, J. delivered the opinion of the court. On the trial of this cause in the court below, the plaintiff offered in evidence certain depositions, taken by virtue of a commission directed to one J. Manager, of Mobile. The defendant opposed their introduction, and after argument, the court sustained the objection, and gave judgment as of non-suit in the cause.

The plaintiff filed a bill of exceptions to the opinion, and took an appeal.

The objections now urged to the reading of these depositions are; 1. That the return to the commission, as a written proof, ought to contain within itself, without any deficiency, the evidence of its own authenticity and regularity. That the notice given by the commissioner to the defendant's partner, is defective, in not stating on what day the witness would be examined; and, that the other notice, served on defendant's attorney, should be wholly disregarded; the law requiring it to be given to the party himself.

On this subject, as well as all others where we have the advantage of statutory regulations of our own legislature, it is unnecessary to look into authorities drawn from other and different sources, and it is only when the language of the statute is obscure, or when its provisions are inadequate, or fall short of the case to be acted on, that we can, with propriety, call to our aid, the opinion of other tribunals; or, that we can correctly resort to legal analogies as the basis of our decision.

On examining the first objection made by

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the defendant, we find, that in the different acts passed on the subject of taking depositions, 2 *Martin's Dig.* 178, *n.* 16, & 194, *n.* 10; also, an act to amend the several acts, enacted to organise the courts of this state, *sec.* 7, passed the 28th of January, 1817, it is provided, that the testimony of witnesses may be taken under a commission, and may be read in evidence after previous reasonable notice of the time and place of taking them, being given to the opposite party. And by the first act passed on the subject, permission is not only given to prove the fact of this notice, by evidence, other than the commissioner's return, but a different manner of establishing it, is actually prescribed. The words of the statute are, "If the party producing the deposition shall prove by affidavit, that notice was given to the adverse party," &c. &c. then the said deposition may be read. So far then, from it being indispensable, that the commission shall contain, within itself, proof of the opposite party being duly notified, the expressions are positive, that it shall be proved by other evidence, and in a case where the testimony is taken under this act, there can be no doubt, but proof by affidavit, is the best evidence which can be produced.

It is true, that the provisions of the statute just referred to, extend only to the taking of testimony *de bene esse*, where the witnesses reside within the limits of the state; and that the subsequent acts of our legislature already cited, do not prescribe in what manner service of the notice on the adverse party shall be established, so as to authorise the reading of the depositions taken under them. But as notice is required, it, of course, becomes necessary, that it shall be proved. The question recurs, in what manner; we think in the same manner as when the witnesses reside within the state, and their depositions are taken under the authority of the act whose provisions have been already quoted. It would be, indeed, strange, if we were obliged to have two rules on this subject: that when the witnesses live within the limits of the state, and their testimony is taken under commission, the fact of the opposite party being notified, must appear by affidavit; when taken abroad, by the certificate of the commissioner.

The act of congress cited by defendant's counsel, cannot affect us in forming a conclusion on this subject. It is a particular law, prescribing the practice to be pursued in the

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courts of the United States. It expressly provides, that proof of notice to the adverse party, shall be given by the commissioner. Our own statute says, it shall be made appear by affidavit. We need not ask, reasoning from analogy, which of these laws we are to resort to, or which of their provisions we are called on to adopt and make our own.

The cases to which the court have been referred to, in 2 *Henry & M'Harris*, 172; and 2 *Washington*, 75, have been looked into. The first turns, as it is expressly stated in the report, on a statute of Maryland. The latter was decided on the ground, that the depositions offered on the trial, in the court below, had been objected to, and that it did not appear in the appellate court, from any thing in the record, that notice had been given to the party against whom the depositions were read.

If our statute had not prescribed a rule which we can safely follow, and we were now called on, in the absence of any authority, to establish one, we should feel great reluctance to adopt that pressed on us by the defendant, as correct. If the commissioner, as is contended, should have proof furnished to him before he examines the witnesses, that notice

was given to the opposite party, and that it is then his duty to certify that proof back to this court, this would not be so good evidence of the fact, as the affidavit of a witness who served it. Should it, on the other hand, be required, that the commissioner must give the notice himself, or direct it to be given, this, in many cases, would produce the greatest inconvenience, as the party may live at a great distance from the place where the witnesses reside, and the testimony has to be taken. Nor is there any good reason why this mode should be pursued; the proof can be got as safely and as certainly from those who served the notice, as it can be in the manner contended for. As the party whom it is necessary to notify, must, at all events, have reasonable previous information, when the testimony is to be taken. It cannot, in any way, affect his interests. Why then require particular species of proof, which, without attaining any essential object, would cramp and impede the administration of justice?

We conclude, therefore, that it is not necessary that it should appear by the return of the commissioner, that notice is given to the adverse party; and we are of opinion,

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that the fact may be established, as it has been done in this case, by affidavit.

The next objection taken by the defendant, *viz.* the want of a particular day on which the testimony would be taken, being inserted in the notice received from the commissioner, is correct. There can be no doubt, that a notification, which professes to be given (as the law requires it should be) with the intention of informing the adverse party of the time and place of doing a certain act, and yet fails to state the day on which that act is to be performed, must, on every principle of good sense, as well as law, be considered as defective and illegal.

It now only remains to consider, whether service of notice on the attorney is good, and if it is not, whether the circumstance of the defendant being absent from the state, does not take it out of the ordinary rule.

The plaintiff insists, that such service is good, and independent of the general rule relied on by him, that notice to the agent is notice to the principal, for whatever relates to the business for which that agent is employed, he has cited *Curia Philipica*, *juicio civil*, 1, *sec.* 12, *n.* 11, to prove, that in all cases after issue

joined, notices of the various acts necessary to carry on a cause to final judgment, must be made on the attorney, and not on the party. Whatever may have been the general rule on that subject in Spain, it is not believed, as it will be hereafter shewn, that it extended to the act of giving notice when testimony was to be taken under a commission. But waving that question for the moment, our statutes already cited, have certainly introduced a different regulation here, as in every act passed on the subject, it is required, that notice should be given to the party.

But if the person whom it is thus necessary to notify, leaves the state, or conceals himself, ought not these circumstances, or either of them, authorise service on the attorney? We think they ought. The statute must have a reasonable construction. It certainly was not the intention of the legislature to require notice to the *party*, when, from his own act, it becomes impossible to serve it on him. Nor could it have been their intention, that because it became thus impossible, by reason of his absence, or concealment, that therefore the cause was never to be tried. Yet, this may, and in many cases will be the conse-

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quence, if the act is literally pursued; for it is plain, that if service, in all cases, must be made on the party, then it will be in the power of either plaintiff or defendant, at their pleasure, to prevent the cause in which they are engaged from being terminated, and thus entirely frustrate the ends of justice. A construction, leading to such consequences, should be avoided, if possible. Nothing could induce this court to adopt it, but the will of the legislature unequivocally expressed. In the language of the supreme court of the United States, "When the literal expressions of the law lead to absurd, unjust, or inconvenient consequences, such a construction should be given as to avoid these consequences, if from the whole purview of the law, and giving effect to the words used, it may be fairly done." 2 *Cranch.* 386, 399.

We adopt this construction the more readily in this case, because the general law on this subject in Spain, was the same as that contained in the acts of our legislature, already referred to. When the testimony of witnesses residing out of the jurisdiction of the court who tried the cause, was taken then by virtue of a commission, directed to another judge,

the rule was to cite the opposite party, if absent; however, notice to his attorney was good, *Febrero addicionada, par.* 2, *lib.* 3, *cap.* 7, *no.* 326. Our statute only re-enacts the general law, and leaves the exception untouched.

An authority has been read from 4 *Mumford*, to shew that when the principal is absent from the commonwealth, that service on the attorney-at-law is not good, that it ought to be given to the agent or attorney, in fact, or if there is none, by publication in the manner prescribed by law. This is a decision under a particular statute. See *Revised Code, Virginia Laws, vol.* 2, *p.* 521, *sec.* 21, in a country where the law has provided a remedy by publication, for the absence of the party, the very evil which is one of the principal reasons that induces this court to hold the service on the attorney good. We have already seen what is the practice in Spain, in regard to taking testimony in this way, and we have no doubt, that both reason and authority require us to sanction and enforce it here.

We conclude therefore, that notice to take depositions, must, in all cases, be given to the parties, if they are in the state. And that if they are absent, or cannot, after reasonable

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diligence, be found, that service may be made on the attorney.

Applying this rule to the case now before the court, we find that both plaintiff and defendant are citizens of other and different states, and it has been proved, that at the time notice was given to the attorney, the defendant did not reside in this state, but was in Mobile, state of Alabama. Under these circumstances, we are of opinion that notice was legally and regularly given to the attorney, and that the plaintiff is entitled to derive the same benefit from it, as if served on the defendant himself.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be annulled, avoided, and reversed, and that the cause be remanded, with directions to the judge, to receive in evidence, the testimony taken under a commission, directed to John Manager, of Mobile, unless some other legal objection is made to its introduction, besides the want of due and regular notice to the defendant. It is further ordered, adjudged, and decreed, that the appellee pay the costs of this appeal.